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REQUEST FOR REVIEW

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June 25, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 02-6
CC Docket NO. 96-45
Billed Entity Name: Chelsea Public School District
Form Application Nos. 1. – 502263 and 2. - 447884
Billed Entity Nos. 120548
FCC Registration No. D012041364

Dear Sir/Madam:

This is the Chelsea Public School's District's ("District") Request for Review (Appeal) of the Schools and Libraries Division ("SLD") of Universal Service Administrative Company's ("USAC") Administrative Decision on Appeal of the above-referenced applications.¹ On January 29, 2009, the District appealed the SLD/USAC finding that the District violated rules and regulations in Funding Years 2005 and 2006 and denied any and all wrongdoing. On April 28, 2010, the District received two separate Universal Service Administrative Company's decisions denying both appeals [See USAC's decisions attached as Attachment A]. The District asserts that USAC has

¹ The District received said decisions on April 28, 2010 and is filing its Request for Review within the 60 Day time period.

100-100000-0

based its opinion on supposition and erroneous facts in its decision-making against the Chelsea Public School District. The District asserts that equity calls for a fair resolution when the evidence is circumstantial and the resolution creates potential economic harm to an urban school district. The facts of this matter are generally stated below and more fully found in Attachment B, the District's appeal to USAC. Thus, the decision should be overturned.

INTRODUCTION AND BACKGROUND

The Chelsea Public School District is a diverse, urban school district right outside Boston, Massachusetts and like all other school districts relies heavily on state and federal funding, including grants from outside services. In 2004, the District had to explore options because the old satellite based system which provided educational programming was being replaced not only by the District but also by the municipality. One of the options explored was digital long distance learning and presentations were made to the District and municipality by eligible telecommunications providers, including Achieve Telecom Network of Massachusetts ("Achieve"). Achieve, like some of the other vendors mentioned possible grants for school districts including the SLD grant and of course the wider known agricultural grants. The District did its due diligence and found that Achieve, like numerous other long distance telecommunications providers were members of the United States Distance Learning Association ("USDLA").

The District complied with all state and federal bidding regulations for both funding years. The District posted its bid for long distance learning and Achieve was the only response to the District's Form 470s. The Form 470s were filed for each funding

year and eventually a Form 471s were submitted informing SLD that Achieve was the chosen provider of long distance learning for the District. In June, USDLA acknowledge and accepted the District's application for the grant. That June letter also notified the District that award was dependent upon the approval of SLD. Since the District desired to have the program with or without the grant it encumbered the funding and entered into a contract in July of 2005 prior to the SLD approval. In August OF 2005, SLD approved the District's grant application and in its approval acknowledged Achieve as the long distance learning provider. SLD, unlike the District had knowledge that the other Massachusetts school districts contracted or applied to have Achieve provide such services. The City received the grant and like other erate programs had the vendor bill the grant provider directly and receive payment [Copies of payments made on behalf of Chelsea are attached in Attachment C].

The process for bidding, awarding and receiving the grant occurred similarly for both funding years and at all times SLD/USDLA knew that the vendor for the District was Achieve.

ARGUMENT

A. THE COMPETITIVE BIDDING PROCESS FOR LONG DISTANCE LEARNING IN CHELSEA WAS OPEN AND FAIR.

The District followed all of the rules and regulations promulgated by both the federal and state governments as to the posting and advertising and there is no evidence to the contrary. At no time, during the process did USLDA nor SLD inform the District that there was an implication of impropriety or unfairness. Instead, the District's actions were approved and confirmed by the acceptance letter notifying the District of their

knowledge that a vendor may have referred the District to the program and that the District had already chosen a vendor. This not only shows clearly that USDLA was aware of Achieve's involvement with the District but also that several other vendors were prompting districts to apply for the grants. Furthermore, the USAC has admittedly found the District guilty because of evidence provided by other districts. It is clear in that statement that they have to find the District guilty in order to recoup its funds from Achieve. This is undoubtedly erroneous and unfair grounds and the decision should be overturned as to the District.

In both decisions, the USAC states that it does not have any documented evidence that shows or prove that the District was offered insider information or a guarantee of fully funded services which would have lead to a violation of the law. The District contends that there is no such evidence because no such guarantee existed. The District's bid was open and the only response was from Achieve and the District had no control over that fact. The assumption that the Chelsea should have known about other districts and knowledge of Achieve offering guarantees is also unsubstantiated. There is nothing in the decision finding that the bid package or the advertisement was tainted towards Achieve whereby another vendor could not or would not bid and the District could still have received the grant funding. Therefore, the District's bidding process was competitive, open and fair.

The decision further asserts that an existence of a partnership tainted the bidding process. USAC has now attempted to create a legal relationship that may not exists but must have been acknowledged or known about by the District. They do so by stating that it is inferred in IRS 990 forms. And also places acknowledgement upon the District for a

statement made to SLD/USLDA after 2007. Even if a district would have checked a webpage the district would have found that most of the vendors providing long distance learning are members of most organizations and usually in some type of partnership to better such organizations and their causes. Again, the SLD and the USDLA should have also checked the website when approving and reviewing the grant applications if such information was readily available and relevant. And the District was not privy to the Special Compliance Review statements made by Achieve. Therefore, SLD/USAC has failed to find any impropriety or an unfair bidding process in the District and the decision should be overturned.

B. THE DISTRICT DID NOT VIOLATE ANY RULES BY SECURING FUNDS PRIOR TO THE AWARD OF THE GRANT

The District executed a contract with Achieve because of a policy of the municipality. All contract for services over 10,000 had to have legal protections in place on behalf of the District, municipality and its employees. If USAC read the contract, they would have found that the payment system was not in fact in violation of any rules or regulations. The contract which is attachment D of Attachment A to this request, did not change the payment process of month to month tariff requirement. The contract provided the vendor with assurances that the District had appropriated funding regardless of the grant to pay for said services and provided the district, along with the municipality legal protections not found in grants between the parties. The contract actually provided the compliance with the rules of the FCC and the rules of the USAC program along with other federal and state requirements. The FCC required a contract to be in place however, the rules of the SLD grant stated we must pay month to month and submit the

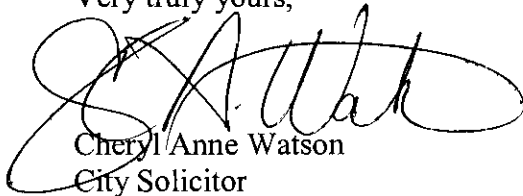
Form 471 in a timely manner. The money was encumbered and the monthly payment were made however, as the facts outline the grant was awarded timely and payment was made to the vendor [See Attachment C]. Clearly, there is no evidence of wrong doing and the appeal should be overturned.

C. THE COMMISSION SHOULD IN ITS DISCRETION APPLY THE PRINCIPLES OF EQUITY

The ultimate goal of the E-rate program is to enhance access to telecommunications service for public and non-profit classroom. 42 U.S.C. §254. The Chelsea Public School District, like many other urban public schools eagerly embraced this goal upon hearing about the E-rate program. There is no dispute that the District provided long distance learning for Funding Years 2005 and 2006 and Achieve was the vendor providing such service. This service was provided to a public school system whereby a majority of its student population live below the poverty line and do not have telecommunications access. The District respectfully asks that if there were any errors made by the District in its selection process and in its bidding process that you in your discretion find that the principles of equity apply and that the District should not be harmed by USAC's decision. There are no violations of the open bidding law by the District that lead the bidding process to be unfair and non-competitive. To find otherwise would not serve the public's interest nor uphold the intent of the statute by placing the District in an economic hardship to repay said grant. *Request for Review of the Decision of Universal Service Administrator by Bishop Perry Middle School New Orleans, LA, et al. File Nos. CC Docket Nos. 02-6 and 96-45, FCC Order 06-54 (2006)*. It is also unfair to assume that the District in any way violated the law because of the acts of a vendor.

Again, SLD has no evidence to prove that District participated or had actual knowledge of actions taken by Achieve in its bidding with other school districts. Equity also calls for the Commission to recognize that the E-rate program in this instance and the funds disbursed were used for appropriate purposes. *Id* at 12. The Chelsea Public School District respectfully prays that the Commission finds that it did not violate any of the federal and state laws regarding public bidding and that the District's bidding process was open, competitive and fair. The District further requests that the USAC's decision to revoke the grant be overturned.

Very truly yours,



Cheryl Anne Watson
City Solicitor

Cc: Joy Jackson
Achieve Telecom Network of MA., LLC
40 Shawmut Road, Suite 200
Canton, MA 02021

Dr. Thomas Kingston
Superintendent of Chelsea Public Schools

All contact information should be sent to Cheryl Anne Watson, City Solicitor, City of Chelsea, 500 Broadway, and Chelsea, Massachusetts, 02150. Telephone, facsimile and email addresses are as follows:

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A



Universal Service Administrative Company

CITY SOLICITOR
Schools and Libraries Division

APR 28 2010

Administrator's Decision on Appeal – Funding Year 2006 - 2007

RECEIVED

April 26, 2010

Cheryl Anne Watson
City Solicitor/School Counsel
City of Chelsea
City Hall, 500 Broadway
Chelsea, MA 02150

RE:	Applicant Name:	CHELSEA PUBLIC SCHOOL DISTRICT
	Billed Entity Number:	120548
	Form 471 Application No.:	502263
	Funding Request Number(s):	1381110
	Your Correspondence Dated:	January 29, 2009

Dear Ms. Watson:

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Commitment Adjustment Letter ("COMAD") to Achieve Telecom Network of Massachusetts, LLC ("Achieve") and Chelsea, Massachusetts Public School District ("Chelsea") for Funding Year 2006 for Application Number 502263. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1381110

Decision on Appeal: **Denied in full**

Explanation:

- On appeal, Chelsea makes several arguments as to why SLD erred in its decision to issue a COMAD and seek recovery of funds that have been improperly disbursed in Funding Year 2006. Chelsea argues that the school district conducted a fair and open competitive bidding process and complied with all applicable rules. Furthermore, Chelsea argues that it accepted the only bid it received, which was from Achieve.
- SLD disagrees with Chelsea's assertions that the competitive bidding process during Funding Year 2006 was fair and open. SLD finds that

Chelsea was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and that Achieve gained an unfair competitive advantage by guaranteeing grants designed to cover Chelsea's non-discounted portion of costs of Achieve's services. The Special Compliance Review ("SCR") team conducted an investigation into Achieve's business practices and determined that Achieve was marketing its services as fully funded and guaranteeing that United States Distance Learning Association ("USDLA") would provide grants to applicants selecting Achieve's services to cover the non-discounted portion of the costs. Although Chelsea and Achieve did not provide any documentation to SLD regarding Achieve's practice of offering fully funded services, SLD did receive such documentation from other E-rate applicants who selected Achieve as their service provider that supports this finding. Moreover, the decision to rescind funding and seek recovery of previously disbursed funds is not solely based on this competitive bidding violation.

FCC rules require a fair and open competitive bidding process. Under the Commission's rules, service providers may not participate in the bidding process other than as bidders because, as the Commission has ruled, "direct involvement in an application process by a service provider would thwart the competitive bidding process."¹ Communications between applicants and service providers that unfairly influence the outcome of the competition, provide inside information, or allow the provider to unfairly compete taints the competitive process. USAC guidance provides in relevant part as follows:

The competitive bidding process must be fair and open. "Fair" means that all bidders are treated the same and that no bidder has advance knowledge of the project information. "Open" means that there are no secrets in the process, such as information shared with one bidder but not with the others, and all bidders know what is required of them.

In order to be sure that a fair and open competition is achieved, any marketing discussions held with service

¹ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, 19 FCC Rcd 6858, ¶ 60 (2003). See also, *Request for Review of the Decision of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 16 FCC Rcd 4028, 4032-33, ¶ 10 (2000); *Request for Review of the Decision of the Universal Service Administrator by SEND Technologies LLC, Schools & Libraries Universal Service Support Mechanism*, Order, CC Docket No. 02-6, DA 07-1270 (2007); *Request for Review of the Decision of the Universal Service Administrator by Caldwell Parish School District, et al., Schools & Libraries Universal Service Support Mechanism*, Order, CC Docket No. 02-6, DA 08-449 (2008).

providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with the service provider prior to the competitive bidding that would unfairly influence the outcome of a completion or would furnish the service provider with “inside” information or allow it to unfairly compete in any way.²

The competitive bidding process in this matter was not fair or open because of Achieve offering to provide fully funded services by using USDLA grants to cover Chelsea’s share of the costs.

- Chelsea further argues that it had no knowledge of any partnership between Achieve and USDLA and was not aware that Achieve solicited donations on behalf of USDLA.
- SLD is aware that Chelsea maintains that it had no knowledge of any partnership between Achieve and USDLA and that Chelsea did not know Achieve solicited funds on behalf of USDLA. However, intent is not a relevant factor when determining whether program rules were violated and SLD routinely test applicants and service providers’ statements and certifications in order to protect program integrity. In this case, information about the partnership between Achieve and USDLA was publicly available on USDLA’s web site. USDLA’s 2004 annual report states that USDLA formed a partnership with Achieve in order to pursue E-Rate K-12 monetary allocation. USDLA’s 2006 and 2007 annual reports explain that USDLA’s partnership with Achieve is providing revenue for the association and that the grant program that funds distance learning projects through E-Rate should be continued.³ It is clear from USDLA’s annual reports that the partnership with Achieve was beneficial to USDLA and that it was improving USDLA’s revenue flow.⁴

Further, any statements that a partnership does not exist between Achieve and USDLA conflict with statements that were obtained from USDLA during the Special Compliance Review. In response to an information request, USDLA CEO John G. Flores specifically named Achieve as one of the members of USDLA and noted that USDLA was “fortunate that many companies who have an interest in e rate opportunities with school

² See www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx.

³ All three reports are available on USDLA’s web site at www.usdla.org.

⁴ USDLA’s Form 990s appear to confirm USDLA’s comments that the partnership with Achieve was successful and was generating revenues for the association. For the years 2002 through 2005, USDLA reported a shortfall at the end of the year on its Form 990s filed with the IRS. However, in 2006 and 2007, USDLA reported a positive balance at the end of the year. (Copies of USDLA’s Form 990s are available at <http://www.eri-nonprofit-salaries.com/index.cfm?FuseAction=NPO.Form990&EIN=680150292&Year=2007>.)

districts across the country are members of USDLA.”⁵ Dr. Flores also commented that as USDLA “solicit[s] donations from philanthropic groups or private donations, [it] work[s] with [school] districts attempting to support what the e rate monies allow them to do. Achieve as a Massachusetts based company has taken advantage of this opportunity.” *Id.* The information received from Dr. Flores directly conflicts with Ms. Jackson’s statements that “Achieve is not a member of USDLA.”⁶

The information regarding USDLA’s partnership with Achieve is publicly available. Thus, Chelsea could have learned about the partnership if it had conducted research on USDLA before applying for and accepting a grant from the organization. The fact that Chelsea was unaware of this information is not relevant since intent is not a factor for determining whether program rules were violated.

- Chelsea argues that it had no knowledge about USDLA’s process and determination for awarding the grants. Chelsea further states that the USDLA grant was not dependent upon the selection of any particular vendor and that Chelsea relied upon that statement.
- SLD agrees that in the initial USDLA letter awarding the grant to Chelsea, the letter included language that said the grant was not dependent on the selection of a particular vendor. However, the inclusion of that statement does not refute the documentation in SLD records and in the submitted appeal papers that show the USDLA grants were specifically earmarked for services provided by Achieve. Notably, the subsequent USDLA letter reaffirming the grant to Chelsea referred to the project as the “AchieveXpress Telecommunications distance learning project,”⁷ despite the fact that Chelsea had titled it the “Chelsea Public Schools District Digital Divide Project” in its grant application.⁸ The fact that USDLA appears to use a standard form letter that refers to these projects as the “AchieveXpress Telecommunications distance learning project” instead using the actual project’s title adds further support to the claim that the USDLA grants were earmarked for Achieve’s services. To date, Chelsea, Achieve, and USDLA have not provided any evidence to refute the finding that the USDLA grants were not independent from Achieve and were earmarked for Achieve’s services.
- Chelsea also argues that Achieve did not market its services as a no-cost service, nor did Achieve guarantee that USDLA would award grants to

⁵ Apr. 3, 2008 E-Mail from Dr. John Flores (USDLA) to Jennifer Baumann (USAC-SCR).

⁶ July 17, 2008 Letter from Joy Jackson (Achieve) to Jennifer Cerciello (USAC-SCR).

→ ⁷ See Aug. 31, 2005 Letter from Dr. John Flores (USDLA) to Mr. Thomas Kingston (Chelsea) (affirming award of grant for the “AchieveXpress Telecommunications distance learning project”).

→ ⁸ See June 27, 2005 Letter from Dr. John Flores (USDLA) to Mr. Thomas Kingston (Chelsea) (granting award to the “Chelsea Public Schools District Digital Divide Project”).

Chelsea if Achieve was selected as the service provider. Chelsea admits that Achieve informed them about the grants from USDLA that could cover their non-discounted portion, but states that it had applied for the USDLA grant prior to Achieve telling it about the grants.

- SLD disagrees with the assertion that Achieve did not guarantee USDLA grants to applicants who selected Achieve's services and that the USDLA grants were not earmarked for Achieve's services. SLD questioned Achieve and USDLA about whether USDLA grants were provided to other applicants who did not select Achieve as their service provider. To date, neither party has responded to the question or provided evidence to show that the USDLA grants were not tied to Achieve's services.

There is also evidence that USDLA did not provide the funding for the grant awarded to Chelsea. Chelsea was awarded a three-year grant in the amount of \$9,030 per Funding Year.⁹ USAC has reviewed the IRS Form 990 that was filed by USDLA for 2006. Line Item 22, under "Statement of Functional Expenses" is where USDLA is required to report the amount it has provided in grants for that year. USDLA's 2006 Form 990, Line Item 22 is blank and USDLA does not claim that any of its revenues was used to provide grants.¹⁰ It is questionable whether USDLA provided the grant to Chelsea since the grant was not reported to the IRS on USDLA's 2006 Form 990.

- FCC rules require applicants to pay the non-discounted portion of the costs. FCC adopted the Federal-State Joint Board on Universal Service's recommendation to promulgate rules that provided universal support to eligible schools and libraries through a percentage discount system rather than allowing free services or block grants to be used to cover the schools and libraries' costs.¹¹ FCC explained that "requiring schools and libraries to pay a share of the cost should encourage them to avoid unnecessary and wasteful expenditures because they will be unlikely to commit their own funds for purchases that they cannot use effectively."¹² In 2003, FCC clarified and codified this restriction, explaining that the rules "require[] that an entity must pay the entire undiscounted portion of any services it receives through the libraries and schools program."¹³ After a thorough review of

⁹ See Aug. 31, 2005 Letter from Dr. John Flores (USDLA) to Mr. Thomas Kingston (Chelsea).

¹⁰ USDLA's 2006 Form 990 available at http://207.153.189.83/EINS/680150292/680150292_2006_03A3AC35.PDF.

¹¹ *Federal-State Joint Board on Universal Service*, Report & Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9035-36, FCC 97-157, ¶ 492 (1997) ("*Universal Service Order*").

¹² *Id.*

¹³ *Schools & Libraries Universal Service Support Mechanism*, Third Report & Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 03-323, ¶ 41 (2003) ("*Third Report & Order*"). This Order codified 47 C.F.R. § 54.523, which states "An eligible school, library, or consortium must pay the non-discount portion of services or products purchased with universal service discounts. An eligible school, library, or consortium may not receive rebates for services or products purchased with universal service discounts." See also, *Schools & Libraries Universal Service Support Mechanism*, Fifth Report and

the evidence in this matter, it is clear that Chelsea failed to pay its non-discounted portion of costs because Achieve provided its services at no-cost to Chelsea.

- Finally, there is an additional ground for denying Chelsea's appeal. Chelsea did not indicate on its relevant Funding Year 2005 Form 470 that it was seeking a multi-year contract or a contract with voluntary extensions. Forms 470 posted in Funding Year 2005 and subsequently to date require applicants to indicate on Item 13 whether the applicant intends to enter into a multi-year contract for services or a contract that includes voluntary extensions. In this case, Chelsea entered a contract with Achieve on July 26, 2005 and extended its contract with Achieve on July 18, 2006.¹⁴ However, as explained above, Line 13 on the Funding Year 2005 Form 470 was blank and Chelsea did not indicate its intention to enter into a multi-year contract with voluntary extensions when it posted its Form 470. Additionally, Chelsea had indicated on its Form 471 that it had a month-to-month services agreement with Achieve, when it actually executed a contract with Achieve. The Commission has advised applicants not mark month-to-month on their Form 471s when they have instead executed a contract with their service provider. *See In the Matter of Request for Review of the Decision of the Administrator by Pasadena Unified School District*, 211 FCC Rcd. 2116, 2120-21 (Feb. 28, 2006). Because FCC rules require the applicant to indicate on its Form 470 and/or Request for Proposal ("RFP") its intent to enter into a multi-year contract for services or a contract that includes voluntary extensions, and because this competitive bidding requirement was not met, this provides an additional ground to deny this appeal.
- SLD has determined that program rule violations have occurred and as a result this appeal is denied in full. Although, Chelsea argues that it complied with all program rules and disclosed the use of the USDLA grants to USAC, the evidence shows Chelsea has not complied with program rules. FCC rules require USAC to rescind funding commitments in all or part, and recover funds when USAC learns that funding commitments and/or disbursements of funds were inconsistent with program rules.¹⁵ In particular, FCC rules require USAC to "recover the

Order and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, 15831, FCC 04-190, ¶ 68 (2004) ("*Fifth Report and Order*") (clarifying and codifying the requirement that schools and libraries certify that they have secured access to the resources necessary to effectively use the products and services purchased with universal discounts, including the ability to pay the non-discounted portion).

¹⁴ See Chelsea Appeal Br. at 3.

¹⁵ See *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 99-291 (1999); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 00-350 (2000); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Schools & Libraries Universal Service Support Mechanism*, Order on Reconsideration and Fourth Report & Order, CC Docket Nos. 96-45, 97-21, 02-6, 19 FCC Rcd 15252 (2004) ("*Schools & Libraries Fourth Report*").

full amount disbursed for any funding requests in which the beneficiary failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 of [FCC's] rules and amplified in related Commission orders."¹⁶ Moreover, FCC rules require "that all funds disbursed should be recovered for any funding request in which the beneficiary failed to pay its non-discounted share."¹⁷

- SLD finds that both Achieve and Chelsea are responsible for these rule violations because Chelsea was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and Achieve gained an unfair competitive advantage by guaranteeing USDLA grants designed to cover the applicant's non-discounted portion of costs for Achieve's services.

For appeals that have been denied, partially approved, dismissed or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We also thank you for your continued support, patience and cooperation during this appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Ms. Joy Jackson
Achieve Telecom Network of MA., LLC
40 Shawmut Road, Suite 200
Canton, MA 02021

Mr. Thomas Kingston
Mr. Miguel Andreottola
Chelsea Public School District
City Hall – 500 Broadway
Chelsea, MA 02150

¹⁶ *Schools & Libraries Universal Service Support Mechanism, Fifth Report and Order and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, ¶ 21 (2004) ("Fifth Report & Order").*

¹⁷ *Id.* at ¶ 24.



CITY SOLICITOR
Schools and Libraries Division

APR 28 2010

Administrator's Decision on Appeal – Funding Year ~~2005~~ 2006

April 26, 2010

Cheryl Anne Watson
City Solicitor/School Counsel
City of Chelsea
City Hall, 500 Broadway
Chelsea, MA 02150

RE:	Applicant Name:	CHELSEA PUBLIC SCHOOL DISTRICT
	Billed Entity Number:	120548
	Form 471 Application No.:	447884
	Funding Request Number(s):	1232738
	Your Correspondence Dated:	January 29, 2009

Dear Ms. Watson:

After thorough review and investigation of all relevant facts, the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") has made its decision in regard to your appeal of SLD's Commitment Adjustment Letter ("COMAD") to Achieve Telecom Network of Massachusetts, LLC ("Achieve") and Chelsea, Massachusetts Public School District ("Chelsea") for Funding Year 2005 for Application Number 447884. This letter explains the basis of SLD's decision. The date of this letter begins the 60-day time period for appealing this decision to the Federal Communications Commission ("FCC"). If your Letter of Appeal included more than one Application Number, please note that you will receive a separate letter for each application.

Funding Request Number(s): 1232738

Decision on Appeal: **Denied in full**

Explanation:

- On appeal, Chelsea makes several arguments as to why SLD erred in its decision to issue a COMAD and seek recovery of funds that have been improperly disbursed in Funding Year 2005. Chelsea argues that the school district conducted a fair and open competitive bidding process and complied with all applicable rules. Furthermore, Chelsea argues that it accepted the only bid it received, which was from Achieve.
- SLD disagrees with Chelsea's assertions that the competitive bidding process during Funding Year 2005 was fair and open. SLD finds that

Chelsea was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and that Achieve gained an unfair competitive advantage by guaranteeing grants designed to cover Chelsea's non-discounted portion of costs of Achieve's services. The Special Compliance Review ("SCR") team conducted an investigation into Achieve's business practices and determined that Achieve was marketing its services as fully funded and guaranteeing that United States Distance Learning Association ("USDLA") would provide grants to applicants selecting Achieve's services to cover the non-discounted portion of the costs. Although Chelsea and Achieve did not provide any documentation to SLD regarding Achieve's practice of offering fully funded services, SLD did receive such documentation from other E-rate applicants who selected Achieve as their service provider that supports this finding. Moreover, the decision to rescind funding and seek recovery of previously disbursed funds is not solely based on this competitive bidding violation.

FCC rules require a fair and open competitive bidding process. Under the Commission's rules, service providers may not participate in the bidding process other than as bidders because, as the Commission has ruled, "direct involvement in an application process by a service provider would thwart the competitive bidding process."¹ Communications between applicants and service providers that unfairly influence the outcome of the competition, provide inside information, or allow the provider to unfairly compete taints the competitive process. USAC guidance provides in relevant part as follows:

The competitive bidding process must be fair and open. "Fair" means that all bidders are treated the same and that no bidder has advance knowledge of the project information. "Open" means that there are no secrets in the process, such as information shared with one bidder but not with the others, and all bidders know what is required of them.

In order to be sure that a fair and open competition is achieved, any marketing discussions held with service

¹ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas, et al., Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, SLD Nos. 321479, 317242, 317016, 311465, 317452, 315362, 309005, 317363, 314879, 305340, 315578, 318522, 315678, 306050, 331487, 320461, CC Docket Nos. 96-45, 97-21, 19 FCC Rcd 6858, ¶ 60 (2003). See also, *Request for Review of the Decision of the Universal Service Administrator by MasterMind Internet Services, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 16 FCC Rcd 4028, 4032-33, ¶ 10 (2000); *Request for Review of the Decision of the Universal Service Administrator by SEND Technologies LLC, Schools & Libraries Universal Service Support Mechanism*, Order, CC Docket No. 02-6, DA 07-1270 (2007); *Request for Review of the Decision of the Universal Service Administrator by Caldwell Parish School District, et al., Schools & Libraries Universal Service Support Mechanism*, Order, CC Docket No. 02-6, DA 08-449 (2008).

providers must be neutral, so as not to taint the competitive bidding process. That is, the applicant should not have a relationship with the service provider prior to the competitive bidding that would unfairly influence the outcome of a completion or would furnish the service provider with “inside” information or allow it to unfairly compete in any way.²

The competitive bidding process in this matter was not fair or open because of Achieve offering to provide fully funded services by using USDLA’s grants to cover Chelsea’s share of the costs.

- Chelsea further argues that it had no knowledge of any partnership between Achieve and USDLA and was not aware that Achieve solicited donations on behalf of USDLA.
- SLD is aware that Chelsea maintains that it had no knowledge of any partnership between Achieve and USDLA and that Chelsea did not know Achieve solicited funds on behalf of USDLA. However, intent is not a relevant factor when determining whether program rules were violated and SLD routinely test applicants and service providers’ statements and certifications in order to protect program integrity. In this case, information about the partnership between Achieve and USDLA was publicly available on USDLA’s web site. USDLA’s 2004 annual report states that USDLA formed a partnership with Achieve in order to pursue E-Rate K-12 monetary allocation. USDLA’s 2006 and 2007 annual reports explain that USDLA’s partnership with Achieve is providing revenue for the association and that the grant program that funds distance learning projects through E-Rate should be continued.³ It is clear from USDLA’s annual reports that the partnership with Achieve was beneficial to USDLA and that it was improving USDLA’s revenue flow.⁴

Further, any statements that a partnership does not exist between Achieve and USDLA conflict with statements that were obtained from USDLA during the Special Compliance Review. In response to an information request, USDLA CEO John G. Flores specifically named Achieve as one of the members of USDLA and noted that USDLA was “fortunate that many companies who have an interest in e rate opportunities with school

² See www.usac.org/sl/applicants/step03/run-open-fair-competition.aspx.

³ All three reports are available on USDLA’s web site at www.usdla.org.

⁴ USDLA’s Form 990s appear to confirm USDLA’s comments that the partnership with Achieve was successful and was generating revenues for the association. For the years 2002 through 2005, USDLA reported a shortfall at the end of the year on its Form 990s filed with the IRS. However, in 2006 and 2007, USDLA reported a positive balance at the end of the year. (Copies of USDLA’s Form 990s are available at <http://www.eri-nonprofit-salaries.com/index.cfm?FuseAction=NPO.Form990&EIN=680150292&Year=2007>.)

districts across the country are members of USDLA.”⁵ Dr. Flores also commented that as USDLA “solicit[s] donations from philanthropic groups or private donations, [it] work[s] with [school] districts attempting to support what the e rate monies allow them to do. Achieve as a Massachusetts based company has taken advantage of this opportunity.” *Id.* The information received from Dr. Flores directly conflicts with Ms. Jackson’s statements that “Achieve is not a member of USDLA.”⁶

The information regarding USDLA’s partnership with Achieve is publicly available. Thus, Chelsea could have learned about the partnership if it had conducted research on USDLA before applying for and accepting a grant from the organization. The fact that Chelsea was unaware of this information is not relevant since intent is not a factor for determining whether program rules were violated.

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- Chelsea argues that it had no knowledge about USDLA’s process and determination for awarding the grants. Chelsea further states that the USDLA grant was not dependent upon the selection of any particular vendor and that Chelsea relied upon that statement.
- SLD agrees that in the initial USDLA letter awarding the grant to Chelsea, the letter included language that said the grant was not dependent on the selection of a particular vendor. However, the inclusion of that statement does not refute the documentation in SLD records and in the submitted appeal papers that show the USDLA grants were specifically earmarked for services provided by Achieve. Notably, the subsequent USDLA letter to Chelsea reaffirming the grant referred to the project as the “AchieveXpress Telecommunications distance learning project,” despite the fact that Chelsea had titled it the “Chelsea Public Schools District Digital Divide Project” in its grant application.⁷ The fact that USDLA appears to use a standard form letter that refers to these projects as the “AchieveXpress Telecommunications distance learning project” instead using the actual project’s title adds further support to the claim that the USDLA grants were earmarked for Achieve’s services. To date, Chelsea, Achieve, and USDLA have not provided any evidence to refute the finding that the USDLA grants were not independent from Achieve and were earmarked for Achieve’s services.
- Chelsea also argues that Achieve did not market its services as a no-cost service, nor did Achieve guarantee that USDLA would award grants to Chelsea if Achieve was selected as the service provider. Chelsea admits that Achieve informed them about the grants from USDLA that could

⁵ Apr. 3, 2008 E-Mail from Dr. John Flores (USDLA) to Jennifer Baumann (USAC-SCR).

⁶ July 17, 2008 Letter from Joy Jackson (Achieve) to Jennifer Cerciello (USAC-SCR).

⁷ See, e.g., Aug. 31, 2005 Letter from Dr. John Flores (USDLA) to Mr. Thomas Kingston (Chelsea) (affirming award of grant for the “AchieveXpress Telecommunications distance learning project”).

cover their non-discounted portion, but states that it had applied for the USDLA grant prior to Achieve telling it about the grants.

- SLD disagrees with the assertion that Achieve did not guarantee USDLA grants to applicants who selected Achieve's services and that the USDLA grants were not earmarked for Achieve's services. SLD questioned Achieve and USDLA about whether USDLA grants were provided to other applicants who did not select Achieve as their service provider. To date, neither party has responded to the question or provided evidence to show that the USDLA grants were not tied to Achieve's services.

There is also evidence that USDLA did not provide the funding for the grant awarded to Chelsea. Chelsea was awarded a grant in the amount of \$9,030. *See* Aug. 31, 2005 Letter from Dr. John Flores (USDLA) to Mr. Thomas Kingston (Chelsea). USAC has reviewed the IRS Form 990 that was filed by USDLA for 2005. Line Item 22, under "Statement of Functional Expenses" is where USDLA is required to report the amount it has provided in grants for that year. USDLA's 2005 Form 990, Line Item 22 is blank and USDLA does not claim that any of its revenues was used to provide grants.⁸ It should also be noted that USDLA's revenues did not cover its expenses for 2005 and it reported a shortfall of \$20,955. *Id.* at Line Item 21. It does not appear from the information reported by USDLA to the IRS that USDLA had the funding to cover the grant that was awarded to Chelsea in 2005. In light of this evidence, it is questionable whether USDLA provided the grant to Chelsea.

- FCC rules require applicants to pay the non-discounted portion of the costs. FCC adopted the Federal-State Joint Board on Universal Service's recommendation to promulgate rules that provided universal support to eligible schools and libraries through a percentage discount system rather than allowing free services or block grants to be used to cover the schools and libraries' costs.⁹ FCC explained that "requiring schools and libraries to pay a share of the cost should encourage them to avoid unnecessary and wasteful expenditures because they will be unlikely to commit their own funds for purchases that they cannot use effectively."¹⁰ In 2003, FCC clarified and codified this restriction, explaining that the rules "require[] that an entity must pay the entire undiscounted portion of any services it receives through the libraries and schools program."¹¹ After a thorough review of

⁸ *See* USDLA's 2005 Form 990, available at http://207.153.189.83/EINS/680150292/680150292_2005_02D7C486.PDF.

⁹ *Federal-State Joint Board on Universal Service*, Report & Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9035-36, FCC 97-157, ¶ 492 (1997) ("*Universal Service Order*").

¹⁰ *Id.*

¹¹ *Schools & Libraries Universal Service Support Mechanism*, Third Report & Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, FCC 03-323, ¶ 41 (2003) ("*Third Report & Order*"). This Order codified 47 C.F.R. § 54.523, which states "An eligible school, library, or consortium must pay the non-discount portion of services or products purchased with universal service discounts. An eligible

the evidence in this matter, it is clear that Chelsea failed to pay its non-discounted portion of costs because Achieve provided its services at no-cost to Chelsea.

- Finally, there is an additional ground for denying Chelsea's appeal. Chelsea did not provide evidence that it had entered a legally binding agreement with Achieve prior to filing the FCC Form 471 for Funding Year 2005. FCC rules require an applicant to sign a contract with the selected service provider for eligible services prior to filing the Form 471. *See* 47 C.F.R. § 54.504(c). In this case, Chelsea filed its Form 471 selecting Achieve as its service provider on February 8, 2005, but did not execute a contract with Achieve until July 26, 2005. Although Chelsea indicated on its Form 471 that it was obtaining funding for month-to-month services, it actually had a contractual relationship with Achieve. *See In the Matter of Request for Review of the Decision of the Administrator by Pasadena Unified School District*, 21 FCC Rcd. 2116, 2120-21 (Feb. 28, 2006) (explaining that the applicant had incorrectly marked services as month-to-month on its Form 471 despite entering a 5-year contract with the service provider). FCC rules require an applicant to have a signed contract or enter a legally binding agreement prior to filing the FCC Form 471. Chelsea has not provided any evidence that it entered a legally binding agreement with Achieve prior to filing its Form 471 in Funding Year 2005 in violation of program rules. This competitive bidding violation provides an additional ground for denying Chelsea's appeal.
- SLD has determined that program rule violations have occurred and as a result this appeal is denied in full. Although, Chelsea argues that it complied with all program rules and disclosed the use of the USDLA grants to USAC, the evidence shows Chelsea has not complied with program rules. FCC rules require USAC to rescind funding commitments in all or part, and recover funds when USAC learns that funding commitments and/or disbursements of funds were inconsistent with program rules.¹² In particular, FCC rules require USAC to "recover the full amount disbursed for any funding requests in which the beneficiary

school, library, or consortium may not receive rebates for services or products purchased with universal service discounts." *See also, Schools & Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, 15831, FCC 04-190, ¶ 68 (2004) ("*Fifth Report and Order*") (clarifying and codifying the requirement that schools and libraries certify that they have secured access to the resources necessary to effectively use the products and services purchased with universal discounts, including the ability to pay the non-discounted portion).

¹² *See Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 99-291 (1999); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association*, CC Docket Nos. 96-45, 97-21, FCC 00-350 (2000); *Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Schools & Libraries Universal Service Support Mechanism*, Order on Reconsideration and Fourth Report & Order, CC Docket Nos. 96-45, 97-21, 02-6, 19 FCC Rcd 15252 (2004) ("*Schools & Libraries Fourth Report*").

failed to comply with the Commission's competitive bidding requirements as set forth in section 54.504 and 54.511 of [FCC's] rules and amplified in related Commission orders."¹³ Moreover, FCC rules require "that all funds disbursed should be recovered for any funding request in which the beneficiary failed to pay its non-discounted share."¹⁴

- SLD finds that both Achieve and Chelsea are responsible for these rule violations because Chelsea was not able to conduct a fair and open competitive bidding process based on Achieve's no-cost guarantee and Achieve gained an unfair competitive advantage by guaranteeing USDLA grants designed to cover the applicant's non-discounted portion of costs for Achieve's services.

For appeals that have been denied, partially approved, dismissed or canceled, you may file an appeal with the FCC. You should refer to CC Docket No. 02-6 on the first page of your appeal to the FCC. Your appeal must be received or postmarked within 60 days of the date of this letter. Failure to meet this requirement will result in automatic dismissal of your appeal. If you are submitting your appeal via United States Postal Service, send to: FCC, Office of the Secretary, 445 12th Street, S.W., Washington, D.C. 20554. Further information and options for filing an appeal directly with the FCC can be found in the "Appeals Procedure" posted in the Reference Area of the SLD web site or by contacting the Client Service Bureau. We strongly recommend that you use the electronic filing options.

We also thank you for your continued support, patience and cooperation during this appeal process.

Schools and Libraries Division
Universal Service Administrative Company

cc: Ms. Joy Jackson
Achieve Telecom Network of MA., LLC
40 Shawmut Road, Suite 200
Canton, MA 02021

Mr. Thomas Kingston
Mr. Miguel Andreottola
Chelsea Public School District
City Hall – 500 Broadway
Chelsea, MA 02150

¹³ *Schools & Libraries Universal Service Support Mechanism*, Fifth Report and Order and Order, CC Docket No. 02-6, 19 FCC Rcd 15808, ¶ 21 (2004) ("*Fifth Report & Order*").

¹⁴ *Id.* at ¶ 24.



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Cheryl Anne Watson
City Solicitor
Cwatson@chelseama.gov

Via Certified Receipt and First Class Mail

January 29, 2009

Letter of Appeal
Schools and Libraries Division
Dept. 125 – Correspondence Unit
100 South Jefferson Road
Whippany, NJ 07981

Re: Appeal of Funding Commitment Adjustment Report
Form 471 Application Number: 502263 and 447884

To Whom It May Concern:

This is the Chelsea School District's (hereinafter "Chelsea") appeal of USAC's Determination that Chelsea violated the Schools and Libraries Program rules in Funding Years 2005 ad 2006. Chelsea adamantly denies any wrongdoing and request that you review the appeal below and the attach documents and overturn your decision to rescind funding in full.

Chelsea asserts that it in no way violated any state or federal laws regarding competitive bidding. In fact, your notification fails to state evidence showing Chelsea in fact violated any rules. This appeal pertains to the following:

Billed Entity: 120548
FCC Registration No.: D012041364
Forms 471 Application Numbers: 447884 and 502263

Chelsea received with the Notification of Commitment Adjustment Letters for Funding Years 2005 and 2006 on or about January 14, 2009. The person you may discuss this appeal with is me, Cheryl Anne Watson, City Solicitor/School Counsel, City of Chelsea, City Hall, 500 Broadway, Chelsea, Massachusetts 02150, telephone 617-466-4150, facsimile 617-466-4159, email cwatson@chelseama.gov.

FACTS:

During the 2004-2005 school year, Chelsea began to explore options to implement a long distance learning option within its menu of course offerings. In the course of this process, for the school years 2005-2006 and 2006-2007, Chelsea entered into a contract with Achieve Telecom to provide long distance learning services and sought funds through the federal erate program and a private grant to pay for this service. Chelsea, in December of 2004 advertised for the long distance learning services using the form 470 process and

indicated in our bidding process that we were going to choose a vendor already approved by the Commonwealth of Massachusetts for these services. The Schools and Libraries Division of the Universal Service Administrative Company (SLD) is the federal agency that approved this service for the erate discount. The form 470 is an approved process by the SLD.

Chelsea also applied for and received a grant from the United States Distance Learning Association (USDLA) to pay for amounts due Achieve Telecom not covered by the erate discount. A summary of the source and use of funds is as follows:

School Year	Achieve Telecom cost of service	Portion funded through erate discount	Portion funded through USDLA grant
2005-2006	\$45,150	\$36,120	\$9,030
2006-2007	\$45,150	\$36,120	\$9,030

School Year 2005-2006

In mid December 2004, Chelsea advertised for responses to Form 470.

On December 20, 2004, Chelsea filed (posted) its Form 470 Form with the SLD [Attached as Exhibit A is Chelsea's Form 470]. Also on December 20, 2004, Achieve Telecom Network ("Achieve") filed its response to the 470 application with Chelsea [Attached as Exhibit B is Achieve's response]. Achieve was the only company to respond.

On February 8, 2005, Chelsea submitted its Form 471 application.

On June 27, 2005, Chelsea received notification from USDLA that it was approved for a grant for Chelsea's Digital Divide Project. In that letter there was no mention of the amount of the grant [Attached as Exhibit C is the June 27, 2005 letter from USDLA]. It should be noted that prior to applying for the USDLA grant Miguel Andreottola, Chelsea Public School's Technology Director, checked the SLD website for information and the guidelines.

On about July 26, 2005, Chelsea entered into a contract for services with Achieve. Chelsea had encumbered the funds for the contract [Attached as Exhibit D is the Contract between Chelsea and Achieve].

On August 31, 2005, Chelsea received a reaffirmation of the grant approved for three years from USDLA. In that letter, USDLA directs and informs Chelsea that all invoices should be sent to its vendor, Achieve [Attached as Exhibit E is the August 31, 2005 letter].

School Year 2006-2007¹

¹ Copies of documents for School Year 1006 – 2007 are available upon request.